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CURRENT TOPICS.

An interesting point in the law of evidence was passed upon by the English Court of Appeal in the case of *Sturla v, Freccia*, decided in July last. In this case, in order to establish the identity of one Mangini with a person of the same name who had been consul of the Ligurian government, there was offered in evidence a report made by a committee appointed by the Ligurian government to inquire as to his fitness for the post, in which report he was described as of a certain age, and a native of a certain place. The court held that these descriptions were immaterial to the object for which the report was made, and that the report was not admissible as evidence of the facts stated in the descriptions. The exceptions to the rule of evidence respecting hearsay were examined at length by the court. "It has been established," said JAMES, L. J., "that statements and declarations made by deceased members of a family, and before any *lis* had been moved, are admissible; but then it is always laid down that such statements are only admissible when made by members of the family. No similar declarations made by the most intimate friends, or made by any person whomsoever except a legitimate member of the family, are admissible in evidence. Therefore this document does not come within that exception. Then, does it come within another exception, which is an entry made by a deceased person of something in the discharge of his duty? The principle of that exception is * * this, that it must be an entry, not of something that was said, not of something that was learned, not of something that was ascertained by the person making the entry, but an entry of a business transaction done by him or to him, and of which he makes a contemporaneous entry. For nothing else was it admissible, and it was received only because it was the person's duty to make that entry at the time when the transaction took place, not to make an entry of something said or ascertained by him at the time when the thing was done, but an entry of that very fact itself of which it was his duty to make an entry at the time. The exception is entirely confined to that. Then there is another exception, which is with regard to entries made against one's interest. Of course, it can not be pretended that this document comes within the principle of an entry by a deceased person charging himself with something, or making some acknowledgment against his interest. Then what is it? It is a report made by some gentlemen filling a public office in Genoa. No doubt it is a report made by them in the discharge of their duty, and in answer to a reference to them on that matter. It is a report made by them to the government. I have not heard anything to satisfy me that any such report made in this country by a similar department would be admissible in evidence, either on authority or on principle. Take the case of a similar reference in this country. Suppose an application is made by some public officer to the government, either for the appointment to an office, or for promotion, and the queen is advised to refer that application to some State department, and the State department makes a confidential report to the queen, giving a biography of the gentleman who has made the application for the office, or for promotion, no such report has ever yet, that I am aware of, been admitted as evidence, and I can not conceive on what principle it would be admissible. We have not any notion in this case of what the gentlemen making the report proceeded upon. They may have satisfied themselves by statements made, or by letters written, which we do not know of, but if the report had appended the letters and the statements made, those letters and those statements themselves would be inadmissible in evidence, on the ground that they were only made by contemporaries and not by relatives; and if these statements themselves would not be admissible as evidence, then the conclusion at which the public department arrived from those statements can not be put higher than the statements themselves, which are not admissible in evidence."

"The report made," said BRETT, L. J., "is offered in evidence of an alleged fact that Mangini who was consul in London, was of a

family of Manginis at a village called Quarto, and was of a certain age. * * * The principle of law relied upon is that which is stated first in the case of Doe v. Turford, 3 B. & Ad. 890. Now I will refer to the principle of law there enunciated by Chief Justice Tindal. It was desired to prove that a particular notice had been served on a particular day, and the evidence to prove it was an indorsement on the notice by the person who had served the notice that he had served it on a particular day, he being dead; but Chief Justice Tindal said: 'This evidence was admissible on the ground that it was an entry made at the time'— that is the first condition — 'of the transaction' — that is, of the transaction which according to the facts of the case had been done or effected by the person who made the entry—'and made in the usual course and routine of business by a person who had no interest to misstate what had occurred.' * * * * After that decision it was attempted in the case of Chambers v. Bernasconi, 4 Tyrw. 531, to put in such an entry, made by such a person, at such a time, not for the purpose of proving merely the transaction which had been done or effected by that person, but also as evidence of facts stated in the entry which were not the transaction, but which might be connected with it, and in that case of Chambers v. Bernasconi it was said that you really must confine the evidence in the entry to the transaction, and you must not extend it, although all the other conditions are fulfilled, to collateral matters other than the transaction which the party had effected himself, however cognate they might be to that transaction, and however naturally described in it. * * * * If you apply that doctrine to this case, then it was the duty of those who made this report to report the result of their inquiries, and it was their duty to make an entry, that is, to write the report directly they had come to that result. This report, therefore, might properly be given in evidence to show, if it were of any use, that that committee had come to a particular conclusion as the result of their inquiry. The only act which they did at the time was to come to a result or determination; but the question whether Mangini belonged to the family of Quarto was not material for anything which they themselves had to do, or which they affected to know. They came to a result with regard, not to that point but to something else, in truth, that he was a fit person to be appointed as consul. The fact of his ever having been at Quarto, or the fact of his being forty-four years of age at that time, was not a thing which they knew, or which they had anything to do with, or as to which they were to make an entry. It seems to me, therefore, that you can not bring this case within the principle laid down by Chief Justice Tindal in Doe v. Turford, which is a recognized principle of the law of evidence, and if you could at all bring it within the principle of Doe v. Turford, it seems to me that these two particular facts would be excluded by the limitation or the refusal to carry that principle further in the case of Chambers v. Bernasconi, because it would seem to me that these two facts were really not material to the purpose of the inquiry. Therefore, even if it could be brought in under Doe v. Turford, it would be shut out by the case of Chambers v. Bernasconi.

In *Washburn v. Artizans Ins. Co.*, decided in the United States Circuit Court, for the Western District of Pennsylvania, on the 10th ult., a policy of insurance on a mill, exempted the defendant from liability in case of fire caused by "explosions of any kind whatever upon the premises." During the life of the policy a destructive fire broke out in the mill, and after it had burned from five to eight minutes an explosion took place, followed shortly by another, and the whole premises were destroyed. It was held that the company was liable. McKennan, J., said: "Was the loss caused by a destructive fire, or by an explosion within the insured premises? I have affirmed the first hypothesis, as supported by the weight of the evidence; but, in view of the effect of the explosion which occurred, it remains to consider whether the loss is within the exception in the policy. That the magnitude of the fire was rapidly increased, and hence the destruction of the premises was promoted and accelerated by the explosion, is incontrovertible. The policy embraces all loss caused by fire, and in this respect the exception does not limit its scope. Both the body of the policy and the exception

have reference to original or proximate causation and to all the resulting consequences. It is only, then, in a case where an explosion originally produces the loss, or there is mere ignition of explosive matter, and a destructive fire ensues, that the exception applies. But where an insured structure is attacked by fire, in the progress of which the ignition of an explosive substance is involved, and its destruction is thereby accelerated or rendered more complete, the loss is just as much attributable to fire as if the result had been effected by unaided gradual combustion. This is the import of the policy, and as the explosion is found to have been a consequence of the fire, the liability of the insurer is unqualified by the exception."

NOTES ON WILLS.

The remark has often been made that it were better that a man let the law make his own will than that he should make it himself. It may be fortunate for the profession that this is not the case, and not a single member will be found to advocate any such doctrine. It is generally conceded, however, that the disposition of property by will has often been attended with fraud and litigation. From an early period in the history of law such has been the result. When Solon introduced his stringent code in Athens providing for the disposition of property by will, it opened the flood-gates of litigation and filled the courts with suitors. When the Romans were vouchsaved this liberty by the law of the twelve tables, it was abused to such an extent that Justinian deemed it necessary to check the freedom of a universal disposition by requiring an attestation by seven witnesses, and preventing the testator from disinheriting his children altogether. A return to the common law system regarding the disposition of personalty might have been preferable. Here the estate of the deceased was divided into three portions, one of which went to his children, another to his wife, and a third was at his own disposal; or, if he had no children, into two portions, of which his wife was entitled to one, and the other was at his own disposal; and it was only when he had neither wife nor children that he was at liberty to dispose of the whole of his personalty to other persons.

This liberty in the English law was then the creature of statutes, which in effect provided that a man could dispose of his personalty, barring the rights of wife and children, subject, however to the rights of his lord, the church, which required of him two of his best chattels, by way of mortuary and heriot.

The history of the devise of real property took a somewhat different phase. Under the Saxons, *folkland* was devisable. With the advent of the Normans this power was checked, because no one could alienate without the consent of the lord, but was evaded by the system of uses by means of which a man could devise to the use of his last will and testament. As the seizin and the use were distinct, the feofee was regarded as seized of the use; a liberty which was summarily restrained by the passage of the statute of uses, (27 Hen. VIII,) uniting the seizin with the use, but by the 32 Hen. VIII was substantially restored. That statute provided for the disposition of all lands held in socage and two-thirds of those held in knight service. By the statute 29 Charles II which abolished military tenures, the liberty of devise was completely established—a statute the provisions of which are embodied in our statute books to-day with some modifications.

To say that a man ought not to have a right to dispose of his property at his death would be almost as unreasonable as to assert that he should be restrained from free alienation during his life-time. And yet there are many who will be found to consider the proposition favorably. The famous case of Jarndyce v. Jarndyce will be brought to mind as a wonderful example of a litigation over the construction of a will, and though it exists only in story and comes from the pen of a writer, the intensity of whose exaggerations often weakened the point of the moral which it was designed to portray, it furnishes an idea of the terrible results for which the statute of Charles the Second is in a great measure accountable.

A review of the ecclesiastical reports from Phillimore to Haggard reveals a remarkable record of interminable litigation over contested wills. There is no question that thousands of estates have been disposed of in a manner inconsistent with the wishes of the testator.

The intention, however, it is said, must govern, but with the qualification by no means trivial, an intention to be gathered from the terms of the instrument. But in the absence of fraud, of proof of undue influence, of insanity and the like, mere extrinsic evidence is of no avail as to proof of intention. You can introduce parol evidence to remove a latent ambiguity or rebut a resulting trust. If the testator said Catherine Earnley, when he meant Gertrude Yarnley, if he said "mod." when he meant "models," you can show the fact. But you can go no further than this; a testator's declarations as to intention prove nothing if they do not harmonize with the instrument itself.

Then it is asked, are the provisions of the statute faulty or are the makers of the wills at fault? But is it not true that the wills of some of the most intelligent men in the community are broken every day? It is answered, because of extrinsic circumstances; fraud and undue influence are shown, insanity, mental derangement, or some such plea is urged, and between juries and perjuries you can accomplish a great deal. It is insisted that without the aid of such defences wills have been held absolutely void by courts of law. It has happened that the wills of some of the most eminent of the English bar have been held void for uncertainty. The case of Sir J. Bland is an instance. He said at the close of his will, that he had disposed of his estate in so clear a manner that it was impossible for any lawyer to doubt about it. This will was afterwards contested, and came before Lord Hardwicke, who said that he was so utterly at a loss to conjecture the intention of the testator, that he wished he could find some ground upon which to found a conjecture.

It is interesting to observe the trivial defences which are often set up to break down wills which would reasonably be regarded as the disposition of a testator of sound mind. The day of setting aside wills because "one word sounded to folly" is past, and what might be regarded as a species of eccentricity bordering on insanity, has been held insufficient to invalidate instruments exhibiting in themselves no serious mental derangement. A remarkable case of eccentricity is that of Morgan v. Boys, 2 Taylor Med. Jur. 555, where a will was upheld on the ground that there was no satisfactory proof of actual unsoundness of mind. The testator devised his property to a stranger, thus wholly disinheriting the heir or next of kin, and directed that his executors should cause some parts of his bowels to be converted into fiddle strings, and that others should be sublimed into smelling salts, and the remainder of his body should be vitrified into lenses for optical purposes. In a letter attached to the will the testator said: "The world may think this to be done in a spirit of singularity or whim, but I have a mortal aversion to funereal pomp, and I wish my body to be converted into purposes useful to mankind." The testator was shown to have conducted his affairs with great shrewdness and ability; that so far from being imbecile, he had always been regarded by his associates through life, as a person of indisputable capacity. Sir Herbert Jenner regarded the proof as not sufficient to establish insanity, but amounting to nothing more than eccentricity.

In the case of Austen v. Graham, 29 Eng. L. & Eq. 38, testator was a native of England, but had lived in the East and was familiar with Eastern habits and superstitions, and professed his belief in the Mohammedan religion. He died in England, leaving a will which, after various legacies, gave the residue to the poor of Constantinople, and also, towards erecting a cenotaph in that city inscribed with his name, and bearing a light continually burning therein. The prerogative court pronounced the testator to be of unsound mind principally upon the ground of this extraordinary bequest, which sounded to folly, together with the wild and extravagant language of the testator proved by parol. On appeal it was held that as the insanity attributed to the testator was not monomania but general insanity or mental derangement, the proper mode of testing its existence was to review the life, habits and opinions of the testator, and on such review there was nothing absurd or unnatural in the bequest, or anything in his conduct at the date of the will indicating derangement, and it was, therefore, admitted to probate.

Some wills in the English ecclesiastical courts have been refused probate on the ground of an absurd fondness for brute animals evidenced by the testators during their lives. In one case, the testatrix being

a female, unmarried, kept fourteen dogs of both sexes in her drawing room. Yglesias v. Dyke, Prerog. Ct., May, 1852. In another case a female who lived by herself kept a multitude of cats, which were provided with regular meals, and furnished with plates and napkins. Taylor Med. Jur. 658. The court observed that this strange degree of fondness for animals in solitary females was not altogether unusual, and held that it could not be regarded as any certain indication of insanity.

It is said that some years ago an English gentleman bequeathed to his two daughters their weight in one pound bank of England notes. The elder got £51.200, and the younger £57.344. A story is told of the famous French grammarian, Vaugelas, as an instance of eccentricity. He was in receipt of several pensions but so prodigal in his liberalities that he always remained poor, and was rarely out of debt, and finally acquired the soubriquet of *hibou*, from his compulsory assumption of the habits of that animal, only venturing in the streets of a night. After disposing of his property, he said: "Still it may be found that after the sale of my library, these funds will not suffice to pay my debts. The only means I can think of to meet them is that my body may be sold to the surgeons on the best terms that can be obtained, and the proceeds applied, as far as they will go, to the liquidation of my debts. As I have been of little service to society while I lived, I shall be glad if I can become of any use after I am dead."

W. H. W.

CONSPIRACY—DAMAGES OCCASIONED BY STRIKE OF WORKMEN.

MAPSTRICK v. RAMAGE.

Supreme Court of Nebraska, October, 1879.

M and seventeen others employed by R as journeymen tailors, conspired together to stop work simultaneously and return their work in an unfinished condition. This intention they carried out, and R was damaged in losing the money which he would have received from the completed garments, as well as by the loss of customers and the injury to the character of his house for punctuality. *Held*, that the facts constituted a good cause of action against M and his associates

Error from the District Court of Gounty.

N. J. Burnham, for plaintiff in error; *J. L. Webster*, for defendant in error.

COBB, J., delivered the opinion of the court:

The plaintiff in error makes two points. First, that the petition in the court below does not state facts sufficient to constitute a cause of action.

* * * * * * * * * *

The petition is certainly rather scant, and had a motion been made for an order requiring the plaintiff to make it more definite and certain, it would probably have been sustained. But after verdict, I think the allegations of the petition sufficient to sustain the judgment.

The petition alleges that the plaintiff was damaged by reason of the defendants having, pursuant to a conspiracy previously formed between themselves, on the thirty-first day of March, 1876, stopped working for the plaintiff and returned to him all jobs of work then in their hands in an unfinished condition, and did return to the plaintiff various and numerous pieces or jobs of work (tailoring) in an unfinished state, which were entirely worthless in said unfinished condition; that said plaintiff could not at said time get any men to finish said work, whereby said plaintiff had been damaged in the sum of $371. One of the issues made by the answer was that the plaintiff sustained no damage by reason of the return to him, by the defendants, of the said jobs (garments) in such unfinished condition and there was testimony before the jury in the county court to that point. I do not think that there is much difficulty in the proposition that where a merchant tailor has a large number of journeymen working for him by the piece, making up garments for his customers, out of material furnished by him for that purpose, and by a preconcerted arrangement between them and the journeymen, instead of finishing the work and thus enabling him to keep his engagements with his customers, they all return the garments in an unfinished state, he would be damaged as well directly in losing the money which his customers would have paid him if he could have delivered the garments to them in a finished condition, as indirectly by the loss of customers, and the damage to the character of his house for punctuality.

The case of Jones v. Baker, 7 Cow. 445, is in point, and I quote a part of the syllabus: "In all other cases of conspiracy the remedy is by action on the case, and one may be convicted and the other acquitted. In these actions actual conspiracy need not be proved; it may be inferred from the circumstances, among which are the acts of the parties in doing the injury which was the object of the conspiracy. J, a merchant tailor, was engaged in carrying on a profitable trade in his line of business from New York to New Orleans, the successful prosecution of which depended upon a knowledge of certain things known to so few that his gains were very large. B, conspired with J's foreman, in J's absence, to obtain the secrets of the business; did obtain them, and was, in consequence, enabled to rival J in his

trade, and J was otherwise injured: *Held*, that an action on the case lay against B and the foreman, at the suit of J, for the conspiracy, and that one of the defendants might be convicted and the other acquitted. In such a suit the damage is the gist of the action, not the conspiracy."

In the case at bar, while the allegation of damage is not set out with that method which would entitle it to be regarded as a model of pleading, yet it was sufficient to inform the defendants of the plaintiff's claim, and the general nature of the proofs necessary to meet it. Upon the trial there was proof of the plaintiff's damage, and this court can not say that such proof was insufficient to sustain the verdict. [The second point—one of practice—is omitted as unimportant.]

The judgment of the District Court must be affirmed.

EFFECT OF PLEDGE OF COMMERCIAL PAPER.

UNION TRUST CO. v. RIGDON.

Supreme Court of Illinois.

[Filed at Ottawa, September 26, 1879.]

1. RIGHTS OF PLEDGEE OF COMMERCIAL PAPER.—A pledgee of commercial paper, unlike a pledgee of chattels, has, in the absence of a special contract, no right to sell such securities, but must collect them and after paying his own debt account to the pledgor for the balance.

2. AUTHORITY TO "SELL" DOES NOT AUTHORIZE A COMPROMISE.—A corporation held in its hands as pledgee for a debt due to it by R two notes of M for $2,000 and $1,000, both overdue. These notes were placed in the hands of the company under a contract which gave it authority to sell them for the purposes of the debt "at public or private sale." Without having brought suit against M or demanded payment of him, the company wrote to him stating that R was indebted to it in a balance of over $1,300, and offering M the first chance to purchase. A few days later the company surrendered the two notes to M on his paying them $1,342.72, the amount then due from R. *Held*, that this was not a "sale," within the meaning of the contract, but was a compromise and was unauthorized.

3. EVIDENCE THAT THE COMPANY made reasonable efforts to sell the notes and failed to find a purchaser, and that said sale and transfer to the maker of the notes was so made without any collusion or actual fraud, and for the best price that could be obtained for them, was irrelevant.

Appeal from the Appellate Court of the First District.

BAKER, J., delivered the opinion of the court:

It seems to be conceded that a case like this has never before arisen. It may be well, therefore, to briefly state some of the principles which govern the relations of a pledgor and pledgee of personal property.

In Cortelyou v. Lansing, 2 Caines Cases, 200, is found an exhaustive examination of the subject of pawns by Kent, J., wherein he not only traces the history of the common law relating thereto from the days of Glanvil, but illustrates that law by apt references to and comparisons with the Roman law and the codes of Continental Europe. He therein notes the true line of distinction between a pledge or pawn of personalty and a mortgage, and says in the case of the former, the legal property does not pass as in the case of a mortgage, with a condition of defeasance, but that the general ownership remains with the pledgor, and only a special property passes to the pledgee.

The law is well settled that where there is no agreement otherwise, the pledgee in possession takes only a lien on the property as a security, and is bound to keep the pledge and not use it to its detriment, and to redeliver it on payment of the debt. His character is that of a trustee for the pledgor, to return the property, if redeemed, and if not redeemed, then first to pay the debt, and, second, to pay over the surplus, and he can not so deal with the trust property as to destroy it or even impair its value. See Wheeler v. Newbould, 16 N. Y. 392. Where there is no special agreement, and where the subject of the pawn consists of ordinary goods and chattels, then they may be sold, and the proceeds applied to the payment of the debt, and this sale may be either a judicial sale, or in most cases, without judicial process, the legal requirements as to notice, and the provisions of the law to secure fair dealing, being duly regarded.

But there is a distinction between a pledge of ordinary chattels and a pledge of commercial paper. We said in Joliet Iron Co. v. Sciota Fire Brick Co., 82 Ill. 548: "The pledge of commercial paper as collateral security for the payment of a debt, does not in the absence of a special power for that purpose, authorize the party to whom such paper is so pledged to sell the securities so pledged, upon default of payment, either at public or private sale. He is bound to hold and collect the same as it becomes due, and apply the net proceeds to the payment of the debt so secured."

The person holding commercial paper as collateral security for a debt due him has no right, unless perhaps in a very extreme case, to compromise with the parties to the security for a less sum than the sum due on the security, and if he does, he will be compelled to account to the pledgor for the full value. Story on Bailments, § 321. And in Garlick v. James, 12 Johns. 145, although it was admitted the defendant acted in good faith, yet as he had compromised with the maker of the note, and had received a less sum than was due, it was held that he did it at his peril, as he acted without authority, and he was held liable for the face value of the collateral note. The principles there stated apply to cases where there is no special contract between the parties authorizing a sale or other disposition of the property or securities pledged.

In this case there is an express stipulation in the contract signed by appellee, to this effect:

"I hereby give said company authority to sell the same, *i. e.* the collateral securities, or any part thereof, on the maturity of this note at public or private sale, without advertising the same, or demanding payment, or giving notice." The salient words of the contract so far as regards this controversy are: "I give authority to sell at public or private sale." Is an arrangement made between the pledgee of past due negotiable paper which matured in his hands and is held as collateral security for a debt, and the maker of such paper, whereby he transfers to such maker that paper for less than its face, and for an amount precisely sufficient to pay the principal debt, a sale within the meaning of the power conferred. This is the real question at issue. There is no doubt the thing here done could not be lawfully done without the aid of the special power.

But, as already remarked, there is no case found where the point at issue has been decided. There is no claim made that the power given is against public policy, or is under the bar of any other legal objection. The only case we find in which there was a special power of like character with that here involved is Sparhawk v. Drexel, 12 Bank. Reg. 450, but the circumstances of that case, and the wrongs there complainined of, were not the circumstances here found or the wrongs here alleged. The court, in that case, laid down this rule of construction as applicable to such power: "Such a contract so far as it enables creditors to extinguish their debtor's right of redemption by a sale, must, like all contracts affecting equities of redemption, be construed benignantly for the debtor—as benignantly for him as may consist with the security of the creditors." And further said: "It is an authority to sell at private or public sale. * * * * But creditors in whom such an authority is vested can not exercise it otherwise than under a trust for the debtor's benefit as well as their own. They are not to frustrate any just expectations of a surplus by forcing sales for barely money enough to secure themselves."

The law will deal with the substance of this transaction, not its form. Appellant held in its hands two notes of Miller, duly indorsed, one for $2,000, and the other for $1,000, both overdue, and both having fallen due while in its possession as security for the principal debt. The presumption is Miller was solvent, and such presumption is not rebutted. Thereupon without having brought suit against or even having ever demanded payment from Miller, the Trust Company informed him that it regretted exceedingly to trouble him about the matter, but that Mr. Rigdon owed it a balance of some $1,300, to pay which it was about to sell these two notes of his and seventeen notes of W. P. Dickinson, for $137.50 each, and concluded with the remark: "I thought perhaps you would prefer to have the first chance to purchase." This letter of May 3d, must be understood if not a direct proposition to surrender and transfer the collateral on payment to the bank of the residue still due on the principal note, at all events as an invitation to a transaction of that character. Six days after the date of that letter from the bank, it sold, surrendered and delivered to said Miller his two notes amounting to $3,000, and the seventeen Dickinson notes upon his paying $1,342.72, the exact amount then due it upon the principal note of appellee.

An agreement between a creditor and his debtor whereby the creditor agrees to take and receive something from his debtor in lieu and satisfaction of his claim would be rather a compromise or an accord and satisfaction, than, correctly speaking, a sale of the claim.

The money paid is given for the purpose of quieting a demand against the debtor. An arrangement whereby the security is transferred for less than is due thereon to the party already bound by it is called by Justice Story in his work on Bailments, § 321, a compromise; and he seems to distinguish such case from the sale of a pledge.

The intention of the parties to the contract is the real point of inquiry. When appellee authorized the Trust Company to sell the securities at public or private sale, what was understood and intended by the parties? Was not an ordinary sale and purchase in their minds—a contract whereby the seller parted with property and title and the buyer obtained property and the title thereto? Can we suppose they contemplated a transfer whereby the property would be destroyed and the title extinguished? If appellee had intended a transaction such as is here involved, would he not have used language such as is used in the books or by the courts, or other apt language, to designate such transaction? Would he not have given authority to compromise or surrender the securities? Is it not a latitudinarian, if not a strained and forced construction, to call the transfer here a sale? In its ordinary sense and according to the common use of language, as also in the strict and proper acceptation of the word, a sale is not understood as designating a transfer such as this.

Again, the power under consideration is in derogation of common law duties and wipes out wise and equitable safe-guards interposed by that law for the protection of the pledgor, and relieves the pledgee from just duties imposed upon him; and which safeguards and duties are intended to prevent fraud and a breach of the trust imposed.

We feel constrained to hold that the transfer here made to Miller of these overdue securities, by which he was himself bound, was not a sale within the scope and intention of the power given to sell at public or private sale.

The findings of fact by the Appellate Court, "that appellant made reasonable efforts to sell said collaterals and failed to find a purchaser." and "that said sale and transfer to said Miller was so made without any collusion or actual fraud, and for the best price that appellant could obtain for them, so far as is shown by the evidence, "do not go to the gist of the injury complained of by appellee. The wrong was not in omitting to make reasonable efforts to sell the collaterals, nor in selling them collusively and fraudulently, nor yet in selling them for a less price

than could have been obtained for them. It was for disposing of them in a manner not within the purview of the power delegated. The tort was the affirmative act of compromising with the maker of the securities.

Appellant might well have sold at private sale to Miller the Dickenson notes, but as we have seen, the transfer was an entire transaction and included Miller's own notes, which were due at the time. and the transaction was a tort and can not be apportioned. But it seems there was some testimony tending to show the insolvency of Dickinson, and it is evident from the verdict that the jury assessed no damage on account of his notes

Among the findings of fact by the Appellate Court was this in reference to the $2,000 Miller note: "That, after the making of the original loan of August, 1875, Miller informed appellant that said collateral note had been given by him to appellee as accommodation paper, and for no value, and that such information from said Miller was communicated to appellee by appellant, and appellee replied that he had given his note therefore to Miller." The presumption of law is that the note was given for a good and valuable consideration. The note of Rigdon to Miller would be a sufficient consideration for the $2,000 note, and the latter would be a binding and valid note against Miller. Besides, the whole question as to whether Miller "occupied the position of a mere surety," and whether "the notes of John Miller were given for a good and valuable consideration," were finally submitted to the jury by the instructions of the court.

This brings us to the matter of the excluded testimony. That it was entirely competent to show that the Miller notes were mere accommodation pape and given for no value, or that there was a legal defense to the notes, or either of them, could not be successfully gainsaid. The amount due on the notes was *prima facie* the measure of damages. American Exp. Co. v. Parsons, 44 Ill. 315.

On the trial the appellant proposed to show that at all these times Rigdon was indebted to Miller; that Miller had been accommodating Rigdon for a long time, and that that indebtedness was up as high as $12,000 or $15,00, and remained so at the time when Miller died, sometime shortly after this transaction. He also proposed to show that Miller had, from time to time, given his paper as an accommodation to Rigdon; was in the habit of doing it. Objections to such proposed testimony were sustained and it was excluded, and exceptions were duly taken. We think this testimony was properly excluded. A part of the offer was merely to prove an affirmative cause of action vested in Miller or his legal representative, a right of action to which appellant was a stranger, and to set off the damage growing out of such cross action against the damages here. This could not be done, as appellant had no such interest in the debts due from appellee to Miller as authorized him to set them off against this recovery. The other element of the offer was to prove a habit of Miller to give his paper to Rigdon as an accommodation. If we admit the habit it does not follow that this particular paper was part of such accommodation paper, and there was no offer to make such identification. If the identity, in fact, existed or could be proven, it must be presumed that appellant's offer would not have been so restricted, but would have gone to that extent. With reference to the larger note there was evidence in the record that it was for value, a promise for a promise; and the $1,000 note was one of a series of notes secured by a mortgage on real estate, and payment of which had been assumed by one Walker.

There was no offer to prove that Miller was insolvent, or that these particular notes were accommodation paper, or that Miller had a legal defense to them. To simply show that he gave other paper to appellee which was for no value, or that he had other claims against appellee, would have been irrevalent to any issue in the case.

The further point is made that Miller, in purchasing his notes from appellant, did not pay their full face amount, and that such purchase would not deprive appellee of his right to recover the residue from Miller. If this be admitted, still a party having two remedies for an injury may elect which to pursue. Similar points were made both in Garlick v. James, *supra*, and in Depuy v. Clark, 12 Ind. 427, and in both cases decided adversely to appellant's claim here urged. That which we have already said sufficiently disposes of the point made upon the rulings of the circuit court in regard to instructions. Those rulings were in substantial conformity with the views herein expressed.

The judgment of the Appellate Court is affirmed.

CERTIFICATES OF DEPOSIT.

KLAUBER v. BIGGERSTAFF.

Supreme Court of Wisconsin, November, 1879.

1. A CERTIFICATE OF DEPOSIT, payable to order, of a certain number of dollars "in currency," is negotiable.

2. THE WORD "CURRENCY" in a certificate of deposit means "money," and includes bank notes issued by authority of law and in actual and general circulation at their legal standard value.

Appeal from Dane Circuit Court.

RYAN, C. J., delivered the opinion of the court:

The controlling question in this case is whether the certificate of deposit stated in the proceedings is negotiable.

"A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Prom. Notes, § 1. The ordinary form of a certificate of deposit of money

falls precisely within the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note. O'Neil v. Bradford, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. Kilgore v. Bulkley, 14 Conn. 362; Bank v. Merrill. 2 Hill, 295; Miller v. Austen, 13 How. 218. The learned counsel for the respondent concedes this; but he takes the position that the certificate of deposit in question is not a promissory note, because it is not payable in money. It is for so many dollars, payable in currency; and the learned counsel contends that the word currency does not express or imply money. It must be conceded that the cases in this court, (Ford v. Mitchell, 15 Wis. 304; Platt v. Bank, 17 Wis. 223; and Lindsey v. McClelland, 18 Wis. 481.) which he cites in support of his position, lend strong sanction to it. These cases were decided, respectively in 1862, 1863 and 1864, when the paper money, circulating in the State *de facto*, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is, perhaps, not altogether an uncommon infirmity of judicial rules that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it.

In Ford v. Mitchell the certificate of deposit was payable in "currency," and protested for non-payment. It had been received by the plaintiff upon a sale made by him to the defendant. A majority of the court concurred in the judgment on the ground that the plaintiff might recover for the original consideration. So Dixon, C. J., who delivered the principal opinion, holds. But his opinion also holds that the defendant was liable as guarantor by force of his indorsement of paper not negotiable. Paine and Cole, JJ., decline to express any opinion on the latter point. In Platt v. Bank, the certificate of deposit was payable in "current funds." The chief justice delivered the opinion of the court, stating that such paper had been held not to be negotiable in Ford v. Mitchell, and that the cases were not distinguishable; adding that the rule is sustained by an almost unbroken current of authority. In this the learned chief justice was not, perhaps, quite as accurate as usual; and he was manifestly mistaken in his statement of Ford v. Mitchell. Though the decision appears to have been unanimous, it plainly proceeded somewhat upon a mistake. In Lindsey v. McClelland the certificate of deposit was payable in "current funds," and was protested for non-payment. The opinion of the court is delivered by Mr. Justice Cole, who not unnaturally falls again into the mistake that the court in Mitchell v. Ford had held that the words "payable in current funds" rendered the instrument not negotiable. Platt v. Bank is not cited. The opinion states that the certificate "is not payable in money or what the court is bound to consider equivalent to money." The opinion then proceeds to show that if the certificate had been negotiable it had been protested so as to hold the defendant as indorser; and further that it had not been received in payment, implying that the plaintiff might recover on the original consideration.

It is thus seen that Platt v. Bank is perhaps the only case in this court positively adjudging that an instrument payable in current funds is not negotiable, and that there is no case so holding of an instrument payable in currency. *Prima facie* there might seem to be little difference in the two terms; but the opinion of the court in Platt v. Bank gives a construction to the term current funds, which the term currency could not properly bear. "It was suggested at the bar that the certificates might be deemed payable in the treasury notes of the United States, and therefore negotiable, since the law of Congress declares such notes to be equivalent to gold and silver coin in payment and tender for debts. But the words 'current funds' can not be so construed. They were undoubtedly intended to include all funds bankable in this State, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of this State passing as currency would have discharged the obligation." With such a construction of the term used the instrument was not payable in money, and therefore not negotiable. So are nearly all the authorities on paper positively payable in specific kinds of bank notes, or in bank notes generally, because not necessarily money.

The true and only test in this respect of the question whether an instrument be negotiable under the statute of Anne, is always whether it is payable in money. Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank notes lawfully issued, actually current at par in lieu of coin, are money. The common term, paper money, is in a legal sense quite as accurate as the term coined money.

The question whether bank notes are money or only choses in action, was directly involved in Miller v. Race, 1 Burr. 452. "The whole fallacy of the argument," says Lord Mansfield, in delivering the unanimous opinion of the court, "turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz: to goods, or to securities, or documents, or debts. Now they are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is used in common payments as money or cash. They pass by a will which bequeaths all the testator's money

or cash and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will £900 in bank notes was considered as cash. On payment of them, wherever a receipt is required, the receipts are always given as for money, not as for securities or notes. So on bankruptcies, they can not be followed as identical and distinguishable from money, but are always considered as money or cash. It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money can not be followed is because it has no ear-mark;' but this is not true. The true reason is, upon account of the currency of it, it can not be recovered after it has passed into currency. So in case of money stolen, the true owner can not recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank note; an action may lie against the finder, it is true, (and it is not at all denied,) but not after it has been paid away in currency. And this point has been determined, even in the infancy of bank notes, for 1 Salk. 146, M. 10, W. 3, at *nisi prius*, is in point. Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Lord Chief Justice Holt, at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Lord Chief Justice Holt in the case I have just mentioned. The action did not lie against the assignee of the bank bill; because he had it for valuable consideration. In that case he had it from the person who found it; but the action did not lie against him because he took it in the course of currency, and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who, *bona fide*, took it in the course of currency, and in the way of his business. A bank note is constantly and universally, both at home and abroad, treated as money—as cash; and paid and received as cash; and it is necessary for the purposes of commerce that their currency should be established and secured."

This case was approved or followed in Clark v. Shee, Cowper, 197; Lowndes v. Anderson, 13 East, 130; Solomons v. Bank, Id. 135; Wright v. Reed, 3 D. & E. 554; Camidge v. Allenby, 6 B. & C. 373; De La Chaumette v. Bank, 9 B. & C. 208; Snow v. Peacock, 3 Bing. 406; Strange v. Wigney, 6 Bing. 667, and other cases. And the opinion of Lord Mansfield goes far to make the word "currency" equivalent to the word "money." It has also been very generally followed in this country. In Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, Mr. Justice Story, in delivering the opinion of the court, says: "Bank notes constitute a part of the common currency of the country, and ordinarily pass as money. When they are received as payment the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord Mansfield observed, in Miller v. Race, 1 Burr. 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

There is a distinction, recognized in many of the cases, between currency which is money and currency which is legal tender. To be money, part of the circulating medium, it is not essential that currency should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. Sears v. Dewing, 14 Allen, 413; Mather v. Kinike, 51 Pa. St. 425. But paper currency—bank notes—which are current *de jure et de facto*, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. Thompson v. Riggs, 5 Wall. 663; Veazie Bank v. Fenno, 8 Wall. 533; Hepburn v. Griswold, Id. 602; Legal Tender Cases, 12 Wall. 457; Young v. Adams, 6 Mass. 182; Snow v. Perry, 9 Pick. 539; Wood v. Bullens, 6 Allen, 516; Bush v. Baldrey, 11 Allen, 367; Moody v. Mahurin, 4 N. H. 296; Cummings v. Putnam, 19 N. H. 569; Brown v. Simons, 44 N. H. 475; Frothingham v. Morse, 45 N. H. 545; Keith v. Jones, 9 Johns. 120; Judah v. Harris, 19 Johns. 144; Leiber v. Goodrich, 5 Cow. 186; Pardee v. Fish, 60 N. Y. 265; Ehle v. Bank, 24 N. Y. 548; Mann v. Mann, 1 Johns. Ch. 231; Bayard v. Shunk, 1 W. & S. 92; Legal Tender Cases, 52 Pa. St. 9; Buchegger v. Shultz, 13 Mich. 420; Williams v. Rorer, 7 Mo. 556; Seawell v. Henry, 6 Ala. 226; Ball v. Stanley, 5 Yerger, 199; Cooley v. Weeks, 10 Yerger, 141; Noe v. Hodges, 3 Humph. 162. Several of these cases will be found to hold that while gold and silver were at a high premium above paper, and not circulated as money, coin was not to be considered as currency, but as a commodity; that the whole currency of the country then consisted of paper money, circulation at par being an essential quality of currency.

In fact almost all civilized countries, including this country, have a mixed circulation of coin and bank notes. These constitute the currency of the country—its money; and the general term, currency, includes both. Currency, therefore, means money—coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money—equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money. In the use of the term, currency does not necessarily include all bank notes in actual circulation; for all bank notes are not necessarily money. In this use of the term, currency includes only such bank notes as are current *de jure et de facto* at the *locus in quo;* that is, bank-

notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin as a substitute for coin interchangeable with coin; bank notes which actually represent dollars and cents and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount—that is, whatever represents less than the standard value of coined dollars and cents at par—does not properly represent dollars and cents, and is not money; is not properly included in the word currency. In this sense national bank notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender. This construction of the term currency might, perhaps, properly be extended to the term current funds. It must extend to the latter term whenever it is used in the legal sense of money. Bankers and money dealers can not, by choice or use of terms, give the character and attributes of money to anything not money—to anything of less value than money. The legislature has doubtless power to make negotiable paper other than for the payment of money, Price v. Bank, 43 Wis. 267; but where a statute is plainly intended to apply to money, every term used to indicate money, not commodities, must be held to signify money in the sense in which that term is here used.

The certificate of deposit in this case calls for so many dollars; that is to say, for so much money. It makes them payable in currency, which also means money. It could be paid only in money. It was, therefore, clearly negotiable under the statute of Anne. Whether the holder could claim its payment in legal tender is a different question, not in this case and not passed upon.

So far the question has been considered under the law as it stood when Ford v. Mitchell, Platt v. Bank and Lindsey v. McClelland were decided; and, in upholding the negotiable quality of the certificate of deposit in this case, it has not been found necessary expressly to overrule any of those cases; hardly any of the language used in the opinions given upon them. But before the certificate of deposit here was made, chapter 5 of 1868 had amended the statute governing such paper. The amendment makes the section embrace certificates of deposit, which was quite unnecessary, because this court had held four years before that such an instrument payable in money is negotiable. Lindsey v. McClelland, *supra*. The effective part of the amendment was the insertion of the word "as" between the words "any sum of money," and the words "therein mentioned," so as to make the section declaring instruments negotiable to read, "whereby he shall promise to pay to any persons or order, or unto the bearer, any sum of money, as therein mentioned," instead of "any sum of money therein mentioned," etc. The littleness of the word introduced by the amendment was learnedly scoffed at by counsel, forgetting that little words as often control meaning as big ones—perhaps oftener; and that the rule of construction, to give effect if possible to every word in a statute, applies *a fortiori* to the word introduced by amendment. As the words "therein mentioned" stood in the original section, they merely applied to the sum of money itself. As controlled by the word introduced by the amendment, they mean the sum of money as it is therein mentioned. That can not mean the terms or conditions of payment, as both the original and the amended section declare that the money shall be due and payable as therein expressed; and the words "as therein mentioned," in the amended section, appear susceptible of no construction except the kind of money therein mentioned.

The learned counsel for the respondent was at the pains of showing that the amended section, as introduced in the legislature, read any "sum of money, in coin or currency, as therein mentioned;" and that the words "in coin or currency" were stricken out before the passage of the section. And he argued with great force that the legislature had refused to make negotiable paper payable in currency. But the argument would apply as well to coin. It is impossible now to say why the words were stricken out. It may have been because they were considered unnecessary, as this court considers them, to the purpose of the section. It may have been, as was suggested from the bench during the argument, because the legislature feared that the words might restrict the negotiability of instruments to such as should be expressly payable either in coin or in currency. Certainly the meaning of the section is broader without the words than it would have been with them. As it is, it extends negotiability to all instruments payable in money, without reference to the kind of money, unless the kind be mentioned in the instrument itself. In Platt v. Bank, Judge Dixon had said: "If the legislature deem it expedient to declare such instruments negotiable, they have the undoubted power to do so." Perhaps the amendment was in answer to that suggestion, and was intended to overrule Ford v. Mitchell, Platt v. Bank, and Lindsey v. McClelland. It was certainly intended to change the statute, and perhaps did change it as now indicated.

The amendment has no further effect on this decision than to relieve the court of the responsibility and lay it on the legislature, for the amended section in effect declares the law to be what this court declares it was without the amendment.

The negotiability of certificates of deposit is of vast importance in commerce. Their want of negotiability upon slight grounds would go largely to prevent their usefulness in the course of business; and this court considers it far wiser to hold them payable in money, when the terms used will admit of that construction, than to hold them not to be negotiable on the ground of the particular terms used.

The judgment is reversed, and the cause remanded to the court below, with directions to render judgment for the garnishee, the appellant here.

PRINCIPAL AND AGENT—AUTHORITY TO GIVE WARRANTY.

COOLEY v. PERRINE.

Supreme Court of New Jersey, June Term, 1879.

1. A SPECIAL AGENT, authorized to sell a horse, is not thereby authorized to warrant the quality on behalf of his principal.

2. AN ACTION TO RECOVER THE PRICE of a horse sold by a special agent, brought after it has ceased to be practicable to avoid the sale and restore the vendor and vendee to their original positions, *e. g.*, after the horse has died in possession of the vendee, does not constitute a ratification of an unauthorized warranty of quality made by such agent.

On *Certiorari* to the Common Pleas of the County of Union.

The following state of the case was agreed upon by the counsel of the respective parties:

The appellees, the plaintiffs below, brought suit against the appellant, as defendant, to recover on a note of $75, dated August 11th, 1875; made to order of Jabez B. Cooley, payable three months after date. Jabez B. Cooley died after the making of the note and before it came due. The note was part consideration on sale of a horse to defendant, Perrine, as below stated. To this action the defendant set up as defense that the horse was warranted sound at the time of the sale, and that he was not sound at that time. The appeal was tried before a jury at May term, 1878.

The horse was in fact sold by one Joseph Woodward to the defendant, who, at the time of the sale, told the defendant that the horse was all right. The only testimony as to the authority of Woodward in respect to this sale, was that of Woodward himself, who testified that at the time of the sale he had been in the employ of Mr. Cooley some seven or eight years; that Mr. Cooley was engaged in carrying on the lumber and coal business at Elizabethport, and was not a horse dealer; that Mr. Cooley had sold only two or three horses during the time witness was in his employ, and then only when the horses were not suitable for his work or not needed for his present service; that witness had never before sold a horse for Mr. Cooley; that at the time of this sale Mr. Cooley was confined to his bed by sickness, which resulted in his death; that defendant several times talked about buying a horse, and then talked about buying another of Mr. Cooley's horses, and finally desired to purchase the horse sold him by witness; that from the stable witness and defendant went to Mr. Cooley's house; that Mr. Cooley was so sick that defendant could not see him; that witness went into Mr. Cooley's room and told him that the defendant wanted to buy this horse; that Mr. Cooley was not at first disposed to sell him this one; he wanted to sell one of the other horses; he then told witness to sell him to the defendant; the price was fixed at $150. This was the only authority witness had to sell, and says that he, witness, would not have sold him without Mr. Cooley's express authority to do so; that having received this direction to sell, he sold the horse to the defendant for the price named; that he told the defendant the horse was all right. But witness now says that Mr. Cooley had not directed or authorized him to make any representations in reference to the horse, or to warrant him. He did not tell Mr. Perrine this at the time of the sale, nor did he tell him that he had any authority to warrant. There was no other evidence as to the authority of Woodward in respect to this sale. These facts were uncontroverted.

There was no proof that either Mr. Cooley, in his lifetime, or his executors, before the death of the horse, ever had any knowledge of the representations made by Woodward.

The court left it to the jury to determine, from this evidence, whether or not Joseph Woodward had been made, or was acting as, such an agent as to bind his principal by his representations or warranty. To which appellees' counsel excepted.

The court also charged "that where goods are sold for a definite price, and there is no warranty, either express or implied, and no fraud in the sale, the vendor will be entitled to recover the full price, even if the article is defective to such an extent as to diminish the value."

The court further charged that if the jury found from this evidence that Joseph Woodward was acting as the agent of Mr. Cooley, and that said Woodward had received authority from said Cooley to warrant said horse, and did warrant said horse as claimed by the defendant, and that said horse was unsound at the time of sale, and was not as represented by said Woodward, then it would be the duty of the jury to find for the defendant. To which counsel for appellees excepted.

Counsel for appellees requested the court to charge that "the servant of a private owner, intrusted to sell and deliver a horse on one particular occasion, is not, by law, authorized to bind his master by a warranty; the buyer, therefore, taking such a warranty, takes it at the risk of being able to prove that the servant had in fact his master's authority for giving it." The court refused so to charge, or to charge differently from charges already made. To which counsel of appellees excepted. Exceptions were allowed accordingly.

DIXON, J., delivered the opinion of the court:

If, in this case, Woodward was anything more than a messenger, he was clearly only a special agent, *i. e.*, one constituted for a specific act and under an express power. As to such an agent, it is settled that he does not bind his principal unless his authority be strictly pursued, and those dealing with him are chargeable with notice of its extent. Dunlap's Paley's Agency, 202; 2 Kent's Com. 620; Story on Agency, §§ 21, 126; 1 Am. Lead. Cas. 560, note. To determine, therefore, whether what Woodward did bound his constituent, his instructions, which are the basis of his authority, must be examined; what is embraced within their legal scope, he could do on behalf of his employer; what is not, he could not so do.

The instructions were to sell a certain horse to a designated person at a fixed price. Herein the

only term subject to any appearance of ambiguity or indefiniteness, was the direction to sell. But I think that also is sufficiently definite in the law to relieve the present inquiry from difficulty. A sale of a chattel is a transfer of its title by the vendor to the vendee for a price paid or promised. 1 Parsons on Contracts, 519. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser in regard to these component particulars. Under certain circumstances a sale legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged. Thus, if a sale be made by sample, it is thereby impliedly warranted that the bulk is of as good quality as the sample. Hence it has been properly held that where a broker was empowered to sell goods which were in bulk, and, by the custom of brokers, it was permissible to sell such goods by sample, and he was not restricted by his instructions as to the mode of sale, his sale by sample, and the warranty of quality therein implied, were binding upon his principal. The Monte Allegre, 9 Wheat. 616; Andrews v. Kneeland, 6 Cow. 354; Schuchardt v. Allens, 1 Wall. 354.

But in a sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than that to sell. Accordingly, in Brady v. Todd, 9 C. B. (N. S.) 592, the court directly decided that the servant of a private owner, intrusted by his master to sell and deliver a horse on one occasion, is not, by law, authorized to bind his employer by a warranty of quality, but, to do so, authority in fact must be shown. The significant circumstances of that case were precisely like those in this, and Chief Justice Erle points out the soundness, both in law and policy, of the rule there applied.

The case of Fenn v. Harrison, 3 T. R. 757, (1790), which is a leading case, illustrates the true principle. There the defendants directed H to take a negotiable bill of exchange to market and get cash for it, but stated that they would not indorse it. It was held that H could not make a contract to bind the defendants to pay the bill. On a second trial, (S. C. 4 T. R. 177,) it appeared that the only direction to H was to get the bill discounted, and upon this the court decided that H. could bind the defendants by indorsement. The purpose of the defendants, in both cases, was to authorize a transfer of the bill; the law recognized two methods of doing this—one by mere delivery, the other by indorsement. The instruction "to get the bill discounted," or "to get cash for that bill," was broad enough to include both methods of transfer, but the limitation shown on the first trial, "that the defendants would not indorse the bill," necessarily confined the agents to the transfer by delivery. On both trials the court bounded the power of the agent by his express authority; but when, on the second trial, it appeared that, within his authority, he had chosen to transfer by indorsement, the liability legally incident thereto attached to his principals. A remark of Ashhurst, J., in the case just cited, and two cases tried before Lord Ellenborough, have given rise to some decisions and more numerous *dicta* in opposition to the views above expressed. Ashhurst, J., said, in illustration of the difference between a general and a particular agent, "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did, nevertheless, warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public can not be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment." This remark lends some countenance to the idea which, however, it does not directly assert, that an authority to sell, given even to a particular agent embraces an authority to warrant in the absence of an express exclusion.

In Helyear v. Hawke, 5 Esp. 72, (1803), Lord Ellenborough said, "I think the master having intrusted the servant to sell, he is intrusted to do all he can to effectuate the sale, and if he does exceed his authority in so doing, he binds his master." As no warranty was shown in this case, it did not become necessary to apply the doctrine thus announced. In Alexander v. Gibson, 2 Camp. 555, (1811,) the same learned chief justice declared that if the servant was authorized to sell the horse, and to receive the stipulated price, he thought he was incidentally authorized to give a warranty of soundness; that it was most usual, on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. In this case the plaintiff called the servant as a witness, who swore that he was expressly forbidden by his master to warrant the horse, and there was no other evidence as to his authority, yet, because the warranty by the servant was proved, the plaintiff recovered on the warranty against the master.

For these *dicta* and decisions no authority is cited. Chief Justice Erle says, in Brady v. Todd, *ubi supra*, that he understands these judges to refer to a general agent employed for a principal to carry on his business of horse dealing. Certainly if the ruling in Alexander v. Gibson had regard to a particular agent, it has not been followed to the extent to which it was there carried. No other case holds that such an agent could bind his principal by a warranty expressly interdicted. But to the extent of holding that a special agent

might warrant if not forbidden, these observations have formed the foundation of some judicial assertions and adjudications.

The earliest case I find in this country is Lane v. Dudley, 2 Murph. 119, (1812,) where Taylor, Chief Justice, citing the substance of Ashhurst's illustration, says an authority to warrant a horse is within the scope of an authority to sell. The decision itself turned on a ratification. In Skinner v. Gunn, 9 Port. 305, (1839,) it is said, "an agent employed to sell a horse may warrant him to be sound, that being usually done in such cases." The suit was on the warranty of a slave, but failed for want of proof. Fenn v. Harrison, Helyear v. Hawke and Alexander v. Gibson, *ubi supra*, are the only cases cited. Following this are Gaines v. McKinley, 1 Ala. 446, and Cocke v. Campbell, 13 Ala. 286, on warranty of soundness of slaves, and Bradford v. Bush, 10 Ala. 386, on warranty of the age of a horse. In Ezell v. Franklin, 2 Sneed, 236, it was held that authority to sell a slave gave authority to warrant soundness, citing Fenn v. Harrison, but no case of special agency; and in Tice v. Gallup, 2 Hun, 446, it was decided that a special agent, authorized to sell a horse, might warrant its age and the cause of its apparant lameness, by virtue of his agency to sell, unless forbidden to so do by his principal. The only case cited for this position is Nelson v. Cowing, 6 Hill, 336, which, however, supports it by a *dictum* only.

These are the only cases I have found wherein it has been decided that an authority to a special agent to sell, embraces an authority to warrant quality. Resting, as they all do, either directly or indirectly, on Fenn v. Harrison, Helyear v. Hawke and Alexander v. Gibson, they no longer have any foundation on authority, since these three cases, if they ever applied to a special agency, are now, in that respect, distinctly overruled by Brady v. Todd, *ubi supra;* a decision foreshadowed by Creswell, J., when, in Coleman v. Riches, 16 C. B. 104, 113 (1855), he asked counsel, citing 2 Camp. 555, "would you hold that to be good law at the present day?" and clearly approved as correct in principle in Udell v. Atherton, 7 H. & N. 170.

Nor have they any better basis on principle than on authority. Their underlying principle is said to be that the agent, being empowered to sell, is intrusted with all powers proper for effectuating the sale, and a warranty of quality is both a proper and a usual power for that purpose. If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy could not be questioned. Undoubtedly his authority extends to whatever is proper to be done in fixing the price, and the time and mode of payment, and the time and mode of vesting the title and delivering the chattel. All these things are incident to the sale. But if the expression means that the agent is intrusted with all powers convenient for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then I think it is in violation of the settled rule that the special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions. For example, it might very much facilitate the sale if the agent could indorse the vendee's note for the purpose of raising the money to pay the price, and such an exercise of power would jeopardise the principal no more than would a sale on credit, and very much less than might a warranty of quality; and yet I imagine that a special agent could not make such an indorsement binding on his employer, for in Gulick v. Grover, 4 Vroom, 463, the Court of Errors held that even a general agent had no authority so to indorse, to enable his principal's debtor to borrow money to pay the debt. So in Upton v. Suffolk County Mills, 11 Cush. 586, it was adjudged that even a general agent for the sale of flour could not warrant that it would keep good during a voyage to California. And in Bryant v. Moore, 26 Vt. 84, a warranty of oxen by a special agent empowered to exchange, was held invalid against the principal. Likewise, in Lipscomb v. Kitrell, 11 Humph. 256, it was decided that an authority to sell a claim confers no authority to guarantee it—that such a guaranty is not a necessary incident of the sale; and a similar conclusion was reached as to bank stock, in Smith v. Tracy, 36 N. Y. 79.

Undoubtedly there are many cases where it has been held that a general agent to sell might warrant quality. A general agent, Mr. Russell, in his treatise on Factors and Brokers, p. 75, defines to be either, first, a person who is appointed by the principal to transact all his business of a particular kind; or, secondly, an agent who is himself engaged in a particular trade or business, and who is employed by his principal to do certain acts for him in the course of that trade or business. Such agencies extend, it is said, to whatever is fairly included among the dealings of that branch of business in which the agent is employed. But their scope arises not out of the instructions given, but out of those implied powers which the law confers, even in spite of instructions, because of which these are often called implied agencies in contra-distinction from special agencies which are express. Thus, in Howard v. Sheward, L. R. 2 C. P. 148, an agent of a horse-dealer bound his master to a warranty of the quality of a horse sold, although directed not to warrant. Other cases of warranty of quality by a general agent are Hunter v. Jameson, 6 Ired. 252; Woodford v. McClenahan, 9 Ill. 85; Milburn v. Belloni, 34 Barb. 607; Nelson v. Cowing, 6 Hill, 336. But it is utterly inadmissible to deduce from these instances of general agency the existence of similar powers in special agents, between whom and general agents Dr. Story says it is very important carefully to discriminate. Story on Agency, § 21.

Nor do I see the propriety of asserting, as a matter of law, that a warranty of quality is a usual means of effecting the sale of a chattel by a private person, *i. e.*, one not a tradesman in the line of the sale, or that it is even a usual attendant upon such a sale. Such warranties may be as various as the qualities of the objects sold, and to

determine, as by a rule of law, which are usual and which not, will involve the courts in discussions where the personal experience of judges must have more influence than legal principles. In every such case the question of usage should be regarded as one of fact and not of law.

Sometimes it has been intimated that a distinction might be based upon whether the warranty by the agent were set up by a plaintiff to maintain a suit against the principal, or by a defendant to resist the principal's suit for the price, and that the attempt of the principal to collect the price, after he has learned of the warranty, is a ratification of it. On the idea that the authority does not cover the warranty, and that the purchaser is chargeable with knowledge of the authority, it is not plain how he can withstand the vendor's claim on a contract made, by alleging a contract which he knew was not made. But if there be anything at all in the distinction, it must be confined to those cases where, when the principal obtains, knowledge of his agent's unauthorized warranty the sale is *in fieri*, or can be declared void and the parties restored to their original position. What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. Combs v. Scott, 12 Allen, 493; Smith v. Tracy, 36 N. Y. 79; Titus v. Phillips, 3 C. E. Green, 541; Gulick v. Grover, 4 Vroom. 463. And if, when he acquires knowledge, he can not, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchasers who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal. Bryant v. Moore, 26 Me. 84.

These views are not at all in conflict with the class of cases which hold that the principal is responsible for the fraud or deceit of his agent, committed in the course of his employment for his employer's benefit. Jeffrey v. Bigelow, 13 Wend. 518; Sandford v. Handy, 23 Wend. 260; Barwick v. Eng. Joint Stock Bank, L. R. 2 Ex. 259; Mackay v. Com. Bank of N. Brunswick, L. R. 5 P. C. 394. Those cases are well founded upon the principle that, as every man is bound to be honest in his dealings with others, so is he bound to employ honest agents, whether they be general or special, and if in transacting his business, and within the range of their authority, they be dishonest, the consequences are legally chargeable to the employer, and not to a stranger. Hern v. Nichols, 1 Salk. 289.

In the present suit I think that the unauthorized warranty, inferred from the honest statement of the agent that the horse was all right, not communicated to the vendor or his representatives until after the horse was delivered to and had died in the possession of the vendee, formed no defense to the claim for the price, and that the appellee's prayer for instructions to the jury was justified by the facts and the law, and should have been granted. Its refusal was error, for which the judgment should be reversed, with costs.

The cause may be remitted to the Common Pleas for a new trial.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW—DISCRIMINATION IN STATE PROCEDURE AGAINST NON-RESIDENTS. — The code of Nebraska provides that an attachment may be issued against a non-resident of the State without the undertaking which is required in the case of a resident. *Held*, that the provision is not in conflict with the requirement of the Federal Constitution (§ 2, art, 4), that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.—*Marsh v. Steele*. Supreme Court of Nebraska. Opinion by MAXWELL, C. J. 20 Alb. L. J. 290.

CONFLICT OF LAWS — PROMISSORY NOTES GOVERNED BY THE LAW OF PLACE WHERE MADE AND PAYABLE.—A promissory note made by defendant as accommodation maker in New York and payable in that State, was discounted for the payee in Massachusetts at a rate lawful there but usurious in New York. *Held*, that the contract was governed by the law of New York, and the note was invalid for usury. Jewell v. Wright, 30 N. Y. 259, approved; Bowen v. Bradley, 9 Abb. Pr. (N. S.) 395, disapproved.—*Dickinson v. Edwards*. New York Court of Appeals. Opinion by FOLGER, J. 20 Alb. L. J. 310.

EXECUTION — SEAT IN THE BOARD OF BROKERS NOT SUBJECT TO.—By the constitution of the Philadelphia Stock Exchange, it was provided that membership might be sold, with the consent of the exchange, and the balance of the proceeds, after satisfying the owner's debts to members, was to be paid to the owner. *Held*, that such membership in the exchange is not property subject to execution in any form, but that it is a mere personal privilege or license to buy and sell at the meeting of the board, It can not be levied on and sold under a *fi. fa.* or attachment execution.—*Pancoast v. Gowen*. Supreme Court of Pennsylvania. Opinion Per CURIAM. 7 W. N. 457.

SALES — CONCURRENCE OF DELIVERY AND PAYMENT.— Plaintiff sold defendant certain tobacco in three lots at three different prices, to be delivered on plaintiff's premises, but to be taken to the railroad depot by plaintiff free of charge. Plaintiff, assisted by defendant, packed two lots of the tobacco, and defendant went away, after directing plaintiff to pack the other lot. The tobacco so packed was forwarded to defendant and duly received, and defendant paid part of the purchase-money. Plaintiff packed the third lot as directed and made it ready for delivery on his premises, and requested payment, which defendant refused, insisting that the tobacco was to be delivered at the depot, and paid for there. Plaintiff, in the exercise of reasonable diligence, afterwards sold the third lot for its full value, but for less than defendant had agreed to pay for it. *Held*, that as plaintiff was required only to be ready to deliver the tobacco at the time and place agreed on, and as he had done that, and as defendant had neither paid nor offered to pay, defendant had broken the contract; that the contract was entire; that plaintiff had a right to re-sell the tobacco, and might recover of defendant the difference between the most that he could get on re-sale and the agreed price, and in addition, the unpaid balance of the agreed price of what was delivered, and that as the cause was referred and the damages sought to be recovered such as might have been recovered on dec-

laration such as the court might have allowed in amendment of a declaration in common counts in assumpsit, plaintiff might recover on such count. — *Phelps v. Hubbard.* Supreme Court of Vermont, Opinion by DUNTON, J. Advance sheets of 51 Vt.

LUNATIC ACCOMMODATION INDORSER — INQUISITION AFTER DATE OF INDORSEMENT — BONA FIDE HOLDER.— An accommodation indorser of a promissory note, given in renewal of a note for a similar amount indorsed by him while of sound mind, who was found by inquisition to have been a lunatic at the time of indorsement of the renewal note, is liable to a bona fide holder who received the note before the inquisition and without notice of the indorser's lunacy. Lancaster County Bank v. Moore, 28 Sm. 407, and Moore v. Lancaster Nat. Bank, 2 W. N. 674, followed. —*Snyder v. Laubach.* Supreme Court of Pennsylvania. Opinion Per CURIAM. 7 W. N. 464.

FIRE INSURANCE—INCREASE OF RISK—SET-OFF IN DIMINUTION OF RISK.—1. Neglect or omission to mention, at the time of application for a policy of insurance, the existence of a carpenter shop in close proximity to the building insured, and the subsequent erection of a new building adjoining the house insured, without notice to the company, is such an increase of risk as will vitiate a policy of insurance containing the following conditions: "The insured hereby covenants that the representations given in the application for this insurance is a warranty on the part of the insured, and contains a just, full, and true exposition of all the facts and circumstances in regard to condition, situation, value, and risk of the property;" and further, that "if, after insurance, the risk shall be increased by any means whatsoever * * * * and the assured shall neglect to notify the company of said increased risk, such insurance shall be void." 2. Set-off in diminution of risk by removal of a building warranted in the application for insurance not to be on the premises on which the insured dwelling stood, is inadmissible against the defense of increase of risk, in violation of the covenants of the policy, by the erection of a new building on an adjoining lot of which the insurance company had no notice.—*Pottsville Mut. Ins. Co. v. Horan.* Supreme Court of Pennsylvania. Opinion by TRUNKEY, J. 7 W. N. 461.

SALES—IMPLIED WARRANTY OF THE FITNESS OF GOODS FOR PURPOSE FOR WHICH THEY ARE BOUGHT.—1. Defendant was the sole stockholder and officer of an incorporated gas company. Plaintiffs, who were makers of gas-meters, shipped and billed to said company a lot of meters, which defendant received and used. Several months afterward defendant wrote plaintiffs that he had taken out three of the meters, and that they refused to pass gas. Plaintiffs replied that they could not account for it, unless the valves were stuck by impurities or other cause, but that if defendant would send the meters back they would repair and return them at their own expense, if they were in fault. Defendant thereupon, by personal letter, ordered of plaintiffs another lot of meters, and wrote them that they could draw on him for the amount of the first bill. The plaintiffs in like manner shipped and billed the meters so ordered to said company, and they were received and used by defendant. A long correspondence ensued in regard to the meters and payment therefor, wherein defendant wrote, "I will remit for your bill very soon," and again, that he proposed to settle the account, and would have done so before, but could not fix in his mind what he ought to do; that he thought he was entitled to some allowance for the imperfect working of meters. *Held*, that although it did not appear that defendant ordered the first lot, it was to be presumed from the way in which the parties had treated the claim that he did, and that as he ordered the second lot and had acknowledged his liability to pay for both lots, he was properly made defendant in assumpsit to recover for both lots. 2. Goods ordered of a manufacturer for a particular purpose, are impliedly warranted fit for that purpose. But the manufacturer is not bound to furnish the best goods of the kind that are or can be made, but only such as are usually made and used—such as are reasonably fit for the purpose. Thus, where it appeared that gas-meters furnished by manufacturers on a general order worked as accurately and well and lasted as long as the meters of other reputable makers, but did not work as accurately and well, nor last as long as the meters of certain English, and perhaps certain other American, makers, it was *held*, that the meters were of the kind and quality required by the order.—*Harris v. Waite.* Supreme Court of Vermont. Opinion by ROYCE, J. Advance sheets of 51 Vt.

SOME RECENT FOREIGN DECISIONS.

PERSONAL INJURIES — ACTION MAINTAINABLE WITHOUT PROOF OF PERMANENT INJURY. — 1. In an action for damages for personal injuries, when the defendant on the pleadings admits negligence, in order to entitle the plaintiff to recover it is not necessary that he should prove that he sustained substantial injury. 2. If a railway company contract to carry A from B to C upon their line of railway, and before the train in which A is traveling reaches C, an accident happens to the train, by reason of the railway company's negligence, and if in consequence A is thrown out of the carriage in which he was traveling, he is entitled to recover damages against the company, whether he sustained any permanent injury or not.—*Philpot v. Cork, etc. R. Co.* Irish High Court, Ex. Div. Ir. L. T. Rep. 155.

EASEMENT —LIGHT— AGREEMENT—VENDOR AND PURCHASER — CONSTRUCTIVE NOTICE. — The mere fact of a purchaser of a plot of land seeing a window in an adjoining tenement facing such land is not sufficient to give him constructive notice of an agreement between his vendor and the owner of the tenement that such window should have an indefeasible right to the access of light, the purchase having been completed without any actual notice of such agreement. Decision of Hall, V. C., reversed. *Dicta* of Lord Chelmsford, in Miles v. Tobin, 16 W. R. 465, disapproved. — *Allen v. Seckham.* English High Court, Chy. Div., 28 W. R. 26.

RECEIVER—APPLICATION FOR PAYMENT OUT OF MONEYS RECEIVED BY HIM BY A JUDGMENT-CREDITOR NOT A PARTY TO THE ACTION.—Where a judgment-creditor of a railway company applied for an order for payment of the sums due under the judgment out of moneys in the hands of a receiver, the receiver having been appointed in a debenture-holder's action against the company, to which action the judgment-creditor was not a party: *Held*, that the judgment-creditor, not being a party to the action had no *locus standi* to apply for payment out of the moneys in the receiver's hands. Neate v. Pink, 3 Macn. & G. 476, considered.—*Brocklebank v. East London R. Co.* English High Court, Chy. Div. 28 W. R. 30.

MARINE INSURANCE—PARTIAL LOSS—COST OF REPAIR — SALVAGE — SUING AND LABORING CLAUSE.— 1. The doctrine that a policy of marine insurance is a contract of indemnity is subject to some qualifications. 2. A ship which was insured for £1,200, and valued at

£2,600, was damaged by perils of the sea, and the owner became liable to the payment of £519 for salvage. The owner elected to repair the ship, which thus became more valuable than it was at the date of the insurance. *Held* (affirming the judgment of the court of appeal, reported 26 W. R. 780, L. R. 3 Q. B. D. 558), that the owner was entitled to recover the cost of repair, less the usual reduction of one-third new for old, up to the amount insured, even though he would have recovered less in the event of a total loss; but (reversing the judgment of the Court of Appeal, and restoring the judgment of the Queen's Bench Division, reported in 26 W. R. 42, L. R. 2 Q. B. D. 501), that no portion of the salvage expenses were recoverable under the suing and laboring clause contained in the policy. Kidston v. Empire Marine Insurance Co., 15 W. R. 769, L. R. 2 C. P. 357, distinguished.—*Atchison v. Loher*. English House of Lords, 28 W. R. 1.

MARRIED WOMAN'S CHOSE IN ACTION — REDUCTION INTO POSSESSION — GIFT BY HUSBAND TO WIFE.—The executors of a will, under which a married woman was entitled to a legacy, paid the legacy by a check for the amount, drawn to the order of the husband and wife. They went to the husband's bankers with the check, duly indorsed, and the wife handed it to the manager, and instructed him, in the husband's presence and with his assent, to open an account in her own sole name, and to place part of the proceeds of the check to the credit of such account, and the remainder to the husband's current account. These instructions were carried into effect, and the wife drew checks on the account from time to time in her own name, in several instances in favor of the husband, who never interfered with the account. The bankers invested a part of the sum in the purchase of certain bonds, and they sent her a memorandum by which they stated that they held the bonds as her property. The wife afterwards declined to accede to a request by her husband to charge her moneys and securities with the payment of the overdrawn balance of his account with the bankers, and the husband went into liquidation. *Held*, that the husband had not reduced the legacy into possession. *Semble*, that if it had been held that the husband had reduced the legacy into possession, it would have been held that there had been a valid gift of the amount by the husband to the wife.—*Parker v. Lechmere*. English High Court, Chy. Div., 28 W. R. 48.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF IOWA.

October Term, (*Dubuque*), 1879.

REMOVAL OF CAUSE TO FEDERAL COURT CAN ONLY BE MADE WHERE THERE IS A CONTROVERSY.—Under the act of March 3, 1875, providing for removals from State to Federal courts in suits "of a civil nature in which there shall be a controversy between citizens of different States," an order for a removal can not be made upon the application of a defendant who has neither answered nor demurred to the petition of plaintiff. The statute contemplates a controversy in a suit and not a suit to which there is no defense. Opinion by ROTHROCK, J.—*Stanbrough v. Griffin*.

STAY OF EXECUTION — WHEN NOT ENTERED OF RECORD—LIEN.—Section 3295 of the code provides that "the surety for stay of execution may be taken and approved by the clerk, and the recognizance entered of record." Section 3298 is as follows: "Every recognizance taken as above provided, shall have the effect of a judgment confessed from the date thereof, against the property of the sureties." Where a stay bond was approved and filed by the clerk, but was not copied into the records of the court: *Held*, that it was not "entered of record" as contemplated by the above provisions, and did not constitute a lien upon the lands of the surety as against subsequent incumbrancers in good faith and without notice. Opinion by BECK, C. J.—*Waldron v. Dickerson*.

RECEIVER—JUDGMENT AGAINST, NOT A LIEN UPON PROPERTY AFTER SALE.—During the pendency of foreclosure proceedings against a railroad, the property was placed in the hands of a receiver, and while under his management the plaintiff, an employee, received injuries for which he recovered a judgment against the receiver. Before the rendition of the judgment, however, and while plaintiff's action was pending, the road was sold under the foreclosure decree and the receiver made his final settlement and was discharged. In an action to enforce plaintiff's judgment against the road: *Held*, that while the receiver might properly have paid it if rendered before his discharge, no lien could attach to the property while in the custody of the court, and the purchaser took the same free from any claim against the receiver. B. C. R. & N. R. Co. v. Verry, 48 Iowa, 458, 7 Cent. L. J. 65. Opinion by ROTHROCK, J.—*White v. Keokuk, etc. R. Co.*

NATIONAL BANKS — WHEN USURIOUS INTEREST IS RESERVED— JURISDICTION OF STATE COURTS.—Where a national bank loans money upon a usurious contract, such penalties and only such can be enforced as are provided in the national banking act. Farmer's & Mechanic's Nat. Bank v. Dearing, 1 Otto, 29. This being the law, and conceding it to be true in a certain sense that the penal statutes of any sovereignty can be enforced only by the courts which belong to that sovereigety, yet where a borrower of money from a national bank at a rate of interest which is usurious is sued by the bank in a State court to recover such interest, he may maintain the plea of usury in the same court. The plaintiff's statement that it is entitled to recover certain interest is not true, and it would be strange if, in an action to enforce a claim which is not valid. the defendant could not be allowed to resist the claim. It is a civil right to make such resistance, and the defendant must be allowed the right in whatever forum the claim is asserted, even though its enforcement would operate in some sense as a penalty upon the plaintiff, Hade v. McVay, 31 Ohio, 231; Ordway. v. Cent. Nat. Bank, 47 Md. 217; Betz v. Columbia Nat. Bank of Pa., 87 Pa. St. Opinion by ADAMS, J.—*Nat. Bank of Winterset v. Eyre*.

SUPREME COURT OF KANSAS.

July Term, 1879.

[Filed Nov. 15, 1879.]

SCHOOL TAX.—1. Section 4 of ch. 149 of the Laws of 1879, p. 270, works by implication a repeal of all prior enactments providing for the levy of a one mill tax for the State annual school fund. Said section is not invalid by reason of conflict with sec. 16 of art. 2 of the State Constitution. Judgment for defendant. Opinion by BREWER, J. All the justices concurring. —*State v. Ewing*.

PRACTICE— MOTION FOR A NEW TRIAL. — Where an action has been tried in a justice's court by a jury,

and judgment rendered for one of the parties, and no motion for a new trial is made, the district court can not reverse the judgment upon allegations in the petition in error that the justice erred in admitting incompetent evidence; in rejecting relevant testimony; in directing the jury, or for other errors of law occurring on the trial. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Holland v. Madenger.*

VOID TOWNSHIP WARRANTS.—C, the president of a railroad corporation, of his own accord and without any previous contract with a township, caused to be printed certain blanks suitable to be used by said township in issuing bonds to said corporation. No authority existed to issue bonds to said corporation, and no such authority was anticipated or expected, C having full knowledge of this lack of authority approached the officers of said township and induced them to receive the blanks, and also sign and issue said bonds, paying them fifty dollars for their services, and also at the same time induced them to issue to him a township warrant for the cost of printing said blanks. *Held*, that no action could be maintained upon said warrant either by C or a party to whom he had transferred it. Reversed. Opinion by BREWER, J. All the justices concurring.— *Salamanca Township v. Jasper County Bank.*

PURCHASERS AT EXECUTION SALES. — Where a judgment is rendered in the district court in favor of the plaintiff, and against the defendant P for money, and against the defendant H that certain real estate belonging to H be sold to satisfy said money judgment; and a case for review in the Supreme Court is then made, settled, signed, attested and filed in the district court, and afterwards said real estate is sold on execution in accordance with said judgment—the judgment-creditor being the purchaser; and afterwards said sale is confirmed by the district court; and afterwards the case is taken to the Supreme Court for review, on the said case made therefor, where the said judgment of the district court against H is reversed: *Held*, that the said sale may be set aside, and the parties placed back in the same condition that they judgment against H had not been rendered. Reverswould be in, if said sale had not been made, and said ed. Opinion by VALENTINE, J. All the justices concurring.—*Hubbard v. Ogden.*

NEGLIGENCE — TURN-TABLE — PERSONAL INJURIES.—1. In an action against a railroad company for injuries received by the plaintiff, a boy twelve years old, on a turn-table, negligently left in a public place, unlocked, unguarded, etc., the questions whether the defendant had anything to do with the turn-table, whether the defendant was negligent or not, and whether the plaintiff was guilty of contributory negligence or not, are questions of fact to be determined by the jury upon the evidence. 2. Where fifty-six miles of railway including a turn-table are constructed and completed, and then the further construction of the railway is suspended for several years, and from and after the said completion of said fifty-six miles of railway, the railway is operated and managed for general business and transportation by the consent of all the parties in the name of the railroad company for which it was constructed, and the construction company is not known to the public or to persons doing business with the railway, but only the railway company, and the railway has not been leased to the construction company: *Held*, that a finding of the jury, approved by the trial court, that the railway company was responsible for the condition of said turn-table, at a period of time about ten months after the completion of said fifty-six miles of railway, will not be disturbed by the Supreme Court, whatever the other evidence may show was the private wish or understanding of the said railway company and said construction company. 3. Where a turn-table is situated near a populous city, in an open prairie, where the cattle of citizens roam and graze; where persons frequently pass and repass, and where boys often play, and yet is left without locks or fastenings, and without being watched or guarded, or even fenced in, and a boy, hunting his father's cows, goes to the turn-table with other boys, and rides and plays upon it, and is injured by means thereof, and the jury find that the railway company leaving the turn-table in that condition is guilty of negligence and is liable for the injuries to said boy: *Held*, that the verdict of the jury is conclusive. And where the jury also find in such a case that said boy is not guilty of contributory negligence, which finding is approved by the trial court: *Held*, that under the circumstances of this case, which are stated more fully in the opinion, said verdict can not be disturbed by the Supreme Court. Affirmed. Opinion by VALENTINE, J. HORTON, C. J., concurring. BREWER, J., not sitting—*Kansas Central R. Co. v. Fitzsimmons.*

SUPREME COURT OF WISCONSIN.

November, 1879.

SERVICE OF PROCESS—DEFENDANT INDUCED TO COME WITHIN JURISDICTION BY FRAUD.—1. Where the defendant in a civil action has been induced by plaintiff's fraudulent representations to come within the jurisdiction of the court, the summons then served upon him will be set aside, although the design of the representations was to obtain his arrest upon a criminal charge, and the institution of the civil action was an afterthought. 2. It seems that in such a case the action should be dismissed even after defendant has made a voluntary general appearance therein; but whether there was such an appearance in this case is not determined. Opinion by LYON, J.—*Townsend v. Smith.*

LIBEL—WHEN PUBLICATION PRIMA FACIE A—PRIVILEGE.—1. A publication which charges that a person while formerly holding the office of sealer of weights and measures and inspector of scales for a certain city, "tampered with" or "doctored" such weights, measures and scales, for the purpose of increasing the fees of his office, is *prima facie* libelous, as tending to bring the accused into public hatred or contempt. 2. On demurrer to a complaint in libel which alleges that defendant made such charges against plaintiff "falsely, wickedly and maliciously," the question whether the publication was privileged does not arise; as privilege does not extend to false charges made with improper motives or express malice. Opinion by COLE, J.—*Eviston v. Cramer.*

PAYMENT—NOTE OF PARTNER AS EVIDENCE OF.—1. The taking, not as payment, of the individual note of one partner for money loaned, though it may be evidence that the loan was not made to the firm, is not conclusive of that fact. 2. Where such individual note of one partner is taken for a loan made at the time to the firm, the presumption is that it was not taken as payment. A remark of Dixon, C. J., in Ford v. Mitchell, 15 Wis. 364, doubted, but distinguished. 3. The complaint avers, in substance, that on, etc., S, as partner in the then existing firm of W & S, borrowed from plaintiff, for and on account of and for the use of said firm, a certain sum, which loan was evidenced by a note for the amount, signed by S, dated on the same day; and that the money so loaned was expended for the use of the firm. *Held*, that under these averments plaintiff may show that the mon-

ey was loaned by him to and upon the credit of the firm; there is no admission that the note was taken in payment, and the complaint is good on demurrer. Opinion by TAYLOR, J.—*Hoflinger v. Wells.*

MERCANTILE AGENCY — LIABILITY OF.— Defendants having a "mercantile agency" with a "collection department," in this State, plaintiffs left with them a claim for collection, and took from them a receipt stating the amount of such claim and that it was to be transmitted by mail for collection or adjustment, to an attorney, at the risk and on account of plaintiffs, and the proceeds to be paid over or accounted for to them, when received by defendants from said attorney. Plaintiffs also signed a receipt in defendant's books, which stated the nature and amount of their said claim, and that the receipt first above mentioned had been given them, reciting its terms. *Held*, 1. That in the absence of any proof of fraud in respect to them, these receipts fix the rights and liabilities of the parties in regard to said claim, even if accepted or subscribed by plaintiffs without reading them. 2. That, under such receipts, defendants were not liable for the acts or default of the attorney employed by them to collect the claim, unless they were guilty of gross negligence in the selection of such attorney. LYON and TAYLOR, JJ., dissent as to second point. 3. What the liability of defendants would have been in the absence of any express contract, not considered. Opinion by COLE, J.—*Sanger v. Dun.*

CONDEMNATION OF LAND—ABANDONMENT—DAMAGES.—1. Where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover for the damages resulting to him from acts done by the corporation in the course of such proceedings, only in case those acts were wrongful. 2. A complaint in such a case alleges that on the 26th of April, 1875, the defendant city concluded that certain premises of defendant, on which was a dwelling house, were necessary for a public street; that on application of the city, a jury was appointed May 3d of the same year, to determine the necessity of the taking, it was necessary, and promptly reported, but the city unnecessarily delayed further action until October 4, 1875, when it confirmed the report of the jury, and directed the board of public works to make an assessment of benefits and damages; that on November 8th, 1875, the condemnation proceedings were abandoned by resolution of the common council; and that, by reason of the pendency of those proceedings and the public knowledge thereof, plaintiff had been unable to rent the premises, to her damage, etc. *Held*, on demurrer, (1.) That the facts averred do not show that the delay of the city to complete the condemnation proceedings was unnecessary, and the general averment to that effect, without facts alleged to support it, is not sufficient. (2.) That mere delay in such proceedings, without any element of malice or want of probable cause for the condemnation, would probably not be a cause of action in any case. (3.) It seems that if plaintiff had leased the premises, covenanting with the lessee for their quiet enjoyment, any damages recovered of plaintiff by the lessee for breach of that covenant, caused by the taking of the land by the city, would have been a valid claim in plaintiff's favor against the city. Driver v. Railway Co. 32 Wis., 569. 3. The complaint also alleged subsequent condemnation proceedings of the city, including the appointment and affirmative report of a jury, confirmation of such report, and an order made for an assessment of benefits and damages; that in the course of these proceedings the board of public works, pursuant to a resolution of the common council, caused public notice to be given that the building would be sold at public auction, and afterwards entered on the land and sold the building; that some two months afterwards the city abandoned the proceedings; and that, in consequence of these proceedings, persons were deterred from renting the premises, and that they had become depreciated in value, to plaintiff's damage, etc. *Held*, that the wrongful act shown by these averments is the entry upon plaintiff's premises and attempted sale of the house; and that, while this may show a cause of action *quare clausum fregit*, it does not show any ground of injury by reduction of the rental value of the premises, which is the gravamen of the present action. 4. Von Vallenburgh v. Milwaukee, 42 Wis. 547, distinguished from this case. Opinion by LYON, J.—*Felton v. City of Milwaukee.*

BOOK NOTICES.

PRINCIPLES OF THE LAW OF REAL PROPERTY, Intended as a First Book for the Use of Students in Conveyancing. By JOSHUA WILLIAMS, ESQ., of Lincoln's Inn, one of Her Majesty's Counsel. Fifth American from the twelfth English edition, with notes and references to the previous American editions by William Henry Rawle and Hon. James T. Mitchell, with additional notes and references by E. COPPEE MITCHELL. Philadelphia: T. & J. W. Johnson & Co. 1879.

In noticing the appearance of another edition of Williams on Real Property, little need be said. As a first book of the law of real property this work has taken a high place, and a generation of lawyers can testify to its merit. In conciseness of language and accuracy of expression no treatise on the law excels it, while in the clearness of its illustration and the attractiveness in which a difficult and dry subject is presented to the beginner, it has its match in but one other text-book for students written by an English author—Mr. Snell's matchless introduction to the Principles of Equity. But Williams on Real Property is not alone a student's book; Rufus Choate making in his diary the entry "Read to-day a page of Williams on Real Property," only shows the esteem in which this book was held by the greatest of American advocates. The present American edition (the fifth) is to all intents a reprint of the fourth. The work has never been much edited, the American notes being few and scanty, and the main distinction sought by the numerous editors appearing to be that of having their names handed kown to posterity in company with the great name of the distinguished author.

A TREATISE ON THE APPLICATION OF PAYMENTS by Debtor to Creditor; Being a Complete Compilation of the Law Pertaining to the Rights of Debtor and Creditor Respectively; and Also Giving the Various rules for the Guidance of the Courts when no Appropriation has been made by the Parties. By GEORGE G. MUNGER. New York: Baker, Voorhis & Co. 1879.

Speaking of the subject of this treatise, a writer in the American Law Magazine remarked some years ago: "No part of the law exhibits, perhaps, such painful uncertainty as that relating to the application of payments made to a creditor by one indebted on various accounts. The student may pause, and after wearing himself over this confusion, turn at length in despair to a more promising chapter." Many judges before and since have admitted the perplexity of the cases and the diversity of the decisions which the books contain upon this branch of the law. This furnishes a good reason for the appearance of an essay which will be of great use to the profession. The author considers the points growing out of the doctrine under the three general rules familiar to students

of the text-books on equity: that the debtor has the right in the first instance to make the application at his pleasure; that in the absence of such an appropriation a similar right enures to the creditor, and that if neither act in the matter the court will make the application as the law and equity of the case may require. The book is written in plain and easily understood language, and evinces a thorough knowledge of the subject on the part of the author. It is to be regretted, however, that it was not published in a more convenient and different style. An essay on a branch of the law heretofore discussed in a single chapter of a legal treatise, containing less than 500 cases, ought scarcely to be expanded into the form of an ordinary law book. To do this it is necessary to use large type and wide spacing, and to have recourse to paragraphs whenever possible. The entire contents of this work might easily, without the omission of a single word, have been issued in the form of a monograph of 100 pages. Its cost would then have been about one-third of that of the present edition, and it would not then have borne upon its face such unmistakable evidence of "padding," not on the part of the author, which often happens, but on that of the publishers, which in the case of the publishers in question has been heretofore rare.

QUERIES AND ANSWERS.

QUERIES.

50. A MORTGAGE WAS MADE to a corporation and acknowledged before a notary public who, at the time of taking the acknowledgment, was a secretary and stock-holder in the corporation to which the mortgage was given. Is the acknowledgment valid and the mortgage legal in the absence of any statutory provision to the contrary? J. P. W.

ANSWERS.

No. 46.

(9 Cent. L. J. 460.)

It is laid down that "a marriage may be proved by the record of a judicial proceeding sustaining it." Bishop on M. & D. § 542. It is also said that while cohabitation and repute will, in all civil proceedings, establish a marriage, they will not establish it in bigamy and other crimes. Bishop on M. & D. § 442. A judgment is not a bar unless "the same evidence will sustain both the present and former action." Freeman on Judgments, 224. On an indictment for bigamy, "an actual and valid marriage must be proved." Phillips on Ev. 631. In the Duchess of Kingston's case, a judgment where the question litigated was, marriage or no marriage, was held not conclusive against the Crown on the charge of polygamy. 2 Smith's Leading Cases, 648 top page, 573 side page. It would appear to follow that "a judicial proceeding sustaining" a marriage, the suit being a civil suit, would not conclude defendant in bigamy. C.

No. 49.

[9 Cent. L. J. 460.]

The note is not negotiable from the fact that there are no words expressed or implied in the note whereby the payor, Richard Roe, extends the promise of paying to another, and if it be assigned it is so under the general rule of law, and is subject in the hands of the assignee to all equitable defenses. See Parsons on Contracts, vol. 1, p. 238. Then the innocent holder could not hold the payor, Richard Roe, and compel him to pay said note, from the fact that the note expressly states that Richard Roe promises to pay John Doe and none other, but if it should say in the note that he promises to pay John Doe or order, then the payor would be liable to the innocent holder, and in case an action should be instituted against the payor, by the innocent holder, the payee should be made a party to the action. J. H. S.

Madison, Ind.

NOTES.

The following extracts from the annual report of the Attorney General of the United States will be of interest to the profession: The number of entries of appeals to the Supreme Court each term since the act of February 16, 1875, sec. 3, increasing to $5,000 the disputed value required to authorize appeal, has been very large. On the October, 1878, docket, there were five cases of original jurisdiction, and 1,333 brought up from inferior courts. On the docket of the current year 10 original cases, and 1,080 appellate cases. The attorney general entered his appearance in 228 cases last term, and 195 the present, showing that the Government is interested in about one-fifth of the cases. During the past fiscal year 2,515 civil suits, in which the United States was a party were terminated in the circuit and district courts. Of these 1,079 were customs suits, in 118 of which judgment was for the United States, in 39 judgment for the defendants, and 922 were either dismissed or discontinued. Two were appealed from the distriot to the circuit courts, and two from the circuit to the Supreme Court. There were 786 internal revenue cases, in 393 of which judgment was given for the Government, in 72 for defendant, and 321 were either dismissed or discontinued. Post offices, 100, judgment for the United States in 50, for defendant, 1, dismissed, 49. Miscellaneous, 550, judgment for United States in 231, in 82 for defendants, and 237 discontinued or dismissed. The aggregate amount of judgments in favor of the United States was $1,151,867.68. There were pending July 1, 1879, 4,236 civil suits, to which the United States was a party. During the past year 13,717 criminal cases were terminated, of which 8,181 were convictions and 5,536 acquittals and *nol. pros.* Amount of fines and forfeitures, $478.535.88. There were 12,801 civil suits commenced during the year, of which were terminated 8,590.

Winthrop W. Ketchum, judge of the United States District Court for the Western District of Pennsylvania, died of apoplexy at Pittsburg on the 7th inst. Judge Ketchum was born at Wilkesbarre, Pa., June 29, 1820. He was a teacher in languages and mathmetics for four years in the Wyoming Seminary. In 1850 he was admitted to the bar, and for three years he was prothonotary for Luzerne County. He served in the State house in 1858, and in the Senate in 1859. From 1864 to 1866 he was Solicitor of the United States Court of Claims. He was elected to the XLIVth Congress as a Republican; serving from March 4, 1875 to March 3, 1877. In 1877 he was appointed as district judge.——Senator Davis, of Illinois, intends to ask Congress for an appropriaton for a statue of Chief Justice Marshall, to be placed in Judiciary Square, Washington——The Tichborne case is to the front once more, and the almost forgotten "claimant" has obtained the ear of the officers of the Crown. An English telegram says that the attorney-general has granted a fiat for a writ of error in the case of Arthur Orton, otherwise known as the Tichborne claimant, on the ground that matters have been put before him sustaining the discussion of the point whether Chief Justice Cockburn should not have made the two sentences of seven years' penal servitude, one of which has just expired, concurrent instead of successive.